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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1687

DAVID MILLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari, entered on October 9, 1973, and (2) granting the Petition. As grounds for this Motion, Petitioner states the following:

I. IT WAS A DENIAL OF DUE PROCESS FOR THE TRIAL COURT TO DENY THE PETITIONER'S MOTION TO WITHDRAW HIS GUILTY PLEA PRIOR TO SENTENCING IN VIEW OF THE HOLDINGS OF SANTOBELLO V. NEW YORK AND GIGLIO V. UNITED STATES, WHICH WERE DECIDED BY THIS COURT *AFTER* THE PETITIONER ENTERED HIS PLEA OF GUILTY.

Prior to the trial of this matter, the Petitioner filed a motion before the United States District Court for the Eastern District of Pennsylvania requesting that the Court require the Government to adhere to a plea bargain they had entered into with the Petitioner. The Government had promised the Petitioner that he would be allowed to enter a plea of guilty to a non-mandatory count of the Indictment, if he would cooperate with the Government as an agent assisting them in "making" narcotics cases. The Petitioner performed his part of the bargain, but the Government reneged on its promise, and required the Petitioner to proceed to trial.

The trial and the hearing on Petitioner's motion commenced on November 12, 1971. Halfway through the trial, the Petitioner entered a plea of guilty to a mandatory five-year count of the Indictment, and the remaining counts in the Indictment were dismissed. A condition of the plea was that the Petitioner had to withdraw his motion requiring the Government to perform under the terms of the plea bargain. The Government required that the motion be withdrawn with prejudice.

It is important to note that the Petitioner withdrew his motion and entered his plea of guilty *before* this Court's ruling in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). At the time the Petitioner made his decision to withdraw his motion, there was little legal authority indicating that the Government's failure to keep its promise under the terms of a plea bargain was a denial of due process.

Sentencing was set for May of 1972, and prior to that date, the Petitioner filed a motion with the District Court requesting that he be permitted to withdraw his guilty plea, on the grounds that the intervening decisions of *Santobello, supra,* and *Giglio, supra,* recognized that the failure of the Government to keep its

promise under a plea bargain was a denial of due process, and required a new trial.

Normally, the trial Court will permit a defendant to withdraw his plea of guilty prior to sentencing on far lesser grounds, *United States v. Slayton*, 408 F.2d 559 (3d Cir. 1969); *United States v. Young*, 424 F.2d 1276 (3d Cir. 1970); however, the motion was denied. Certainly, the mere interest of the Government in avoiding their own culpability cannot outweigh the interests of the Petitioner, when he asserts reasons of a constitutional magnitude for withdrawing a guilty plea. See *Dukes v. Warden*, 406 U.S. 250, 257-258, 92 S.Ct. 1551, 32 L.Ed.2d 45 (1972). It is the Petitioner's position that under these circumstances, he should have been permitted to withdraw his guilty plea, and pursue his constitutional right to determine whether the Government had failed to keep its promise. The net affect was that the Petitioner was denied due process, and the Government was permitted to cover up its own culpability.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that the Court grant rehearing of the order of denial, vacate that order, grant the Petition and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

MICHAEL D. KIMERER, Counsel for the Petitioner, certifies to this Court that this Petition for Rehearing is presented in good faith, and not for delay.

Counsel further certifies that this Petition is restricted to a substantial ground which was available to the Petitioner, but which was not previously presented to this Court.

Michael D. Kimerer

Counsel for Petitioner